



CHAPTER 14

SCHOOL INFRASTRUCTURE AND EQUIPMENT

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This chapter is an update of an earlier version by Lisa Draga

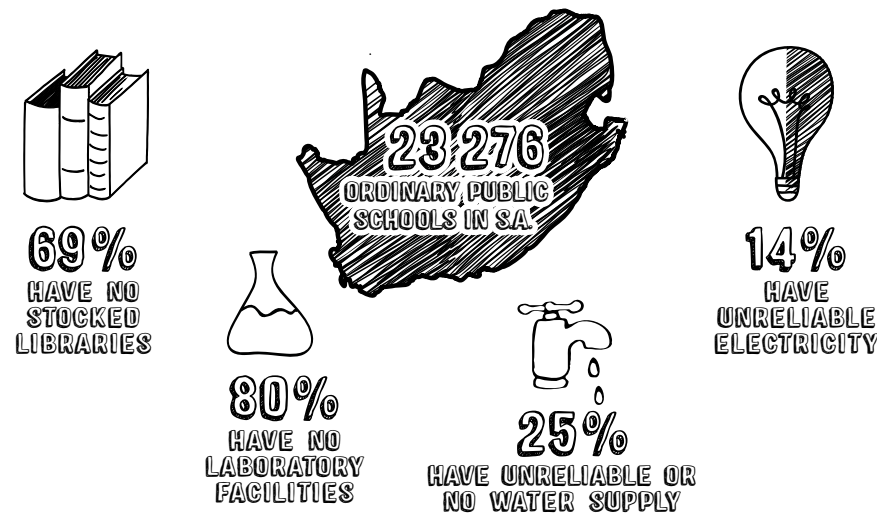


Figure 13.1: Conditions in ordinary schools in South Africa.

INTRODUCTION

Every learner has the right to attend a school that is safe and clean and that serves their educational needs.

Schools therefore need proper facilities such as adequate school buildings, sufficient classrooms, proper toilets, laboratories, libraries, and sports fields in order to provide a quality education and a safe and healthy learning experience. Sadly, thousands of public schools across the country struggle with inadequate infrastructure, and learners are forced to learn in schools that only have mudbrick or zinc classrooms, cracked floors and ceilings, loose wiring, broken toilets or pit latrines, and no libraries or laboratories.

Statistics published by the Department of Basic Education (DBE) in the National Education Management System (NEIMS) report of 12 April 2021 show how severe this problem really is. For example, of the 23 276 public ordinary schools in the country, around 69 percent do not have libraries, 80 percent have no laboratory,

and 5 836 schools have an unreliable water supply. In addition, a total of 3 343 schools are expected to function with an unreliable electricity supply, while 5 167 schools are still expected to use unsafe and unlawful pit toilets.

The NEIMS report also shows that some provinces are affected more than others. For example, schools in Limpopo, the Eastern Cape and KwaZulu-Natal suffer the greatest challenges and have the highest rates of unreliable water supply and pit toilets in the country. In addition, around 93 percent of schools in the Eastern Cape and Limpopo do not even have a library or laboratory. Many of these schools are located in poorer, rural parts of these provinces and have very little chance of being financially supported by their communities, which widens the gap

further between poor schools in rural areas and well-resourced schools in richer urban areas. In addition to these challenges, many schools have also been vandalised to the extent that they need repairs, while others have suffered severe damage and destruction as a result of community protests and uprisings.

For many schools across the country, inadequate school infrastructure is also a remnant of discriminatory apartheid policies that deliberately underfunded black learners and the schools they attended. As a result, some communities were forced to build their own schools and fix their own classrooms with the materials they had available to them. This was often mudbricks, zinc or clay, and today, many of these schools continue to operate despite being severely dilapidated and unsafe.

THE IMPACT OF INADEQUATE SCHOOL INFRASTRUCTURE ON TEACHING AND LEARNING

Studies are continuing to show the clear link between safe and adequate school infrastructure and improved teaching and learning.

When school environments are threatened by poor, dangerous or dilapidated buildings, learners are forced to learn in conditions that leave them feeling anxious, unsafe and distracted, which affects their ability to concentrate and learn.

In 2021, SECTION27 visited schools in Limpopo that were still struggling with various infrastructure problems that included deteriorating mudbrick classrooms, zinc roofs, crumbling floors, poor sanitation and pit latrines. From learners' and teachers' accounts, these problems have devastating effects on teaching and learning.

For example, in some schools SECTION27 visited, teachers and learners fear for their safety as crumbling walls and broken zinc roofs are at risk of falling at any time, especially during storms. In the summer months, the temperatures in classrooms with zinc roofs are unbearable, while the noise caused by heavy rain

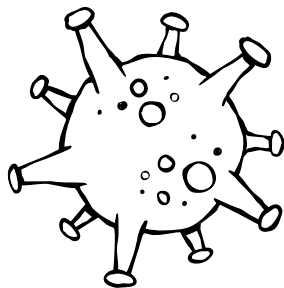
makes it impossible to hear a teacher in class. Some classes are even dismissed during heavy rain or wind because it is impossible to teach with the noise. Some of these schools are too full; and since they do not have sufficient funds to build more classrooms themselves, overcrowding is a constant problem. In addition, a few of the schools SECTION27 visited are continually ravaged by storms that cause further damage to already fragile and broken school structures, while leaks in the roof damage textbooks and furniture, sometimes beyond repair.

Many of these schools are also still using pit latrines, and some have the additional problem of not having sufficient toilets to serve all their learners, forcing them to relieve themselves in fields. Poor sanitation facilities also tend to affect female learners more; they need proper toilets that maintain privacy, and proper hygiene, particularly when they are

menstruating. When sanitation facilities are bad or non-existent, school absenteeism among female learners often increases.

Poor infrastructure conditions also have a negative psychological impact on learners and teachers. During its school visits, some learners reported to SECTION27 that they felt demotivated, disinterested and dejected, while teachers find it difficult to stay at these schools and feel pressured to catch up lost work when learners are absent or dismissed due to bad weather. Teachers complain that some parents even send their children to schools further away because the facilities at local schools are too bad.

These are just some of the challenges learners and teachers across the country face when school infrastructure is dilapidated and inadequate, which clearly denies learners the opportunity to access education properly, safely, and in a dignified way.



THE IMPACT OF COVID-19 ON SCHOOLS WITH INADEQUATE INFRASTRUCTURE

The introduction of a pandemic to the already significant challenges experienced by thousands of South African schools has made the situation untenable. In March 2020, President Cyril Ramaphosa announced a national lockdown to prevent the spread of COVID-19, which included the closure of all schools. However, as the number of cases started to drop, the DBE began the process of reopening schools, and released several directives containing measures that need to be in place to address, prevent and combat the spread of COVID-19.

The DBE also released a number of guiding documents such as the Standard Operating Procedures for Management of COVID-19 in schools ('SOPs') and the DBE Guidelines for Maintaining Hygiene in Schools. These included guidelines on the ventilation requirements in the classrooms, the need for learners and teachers to wear masks, physical distancing requirements and

personal hygiene standards. Similarly, the DBE directions also required school hostels to comply with the necessary health, safety and social distancing measures, adding that schools or their hostels would have to make alternative provision in the event that not all learners could be accommodated due to social distancing requirements. Only if such provision was not possible

would the provincial departments of education assist in the provision of additional infrastructure capacity.

However, the expectation that rural schools and school hostels – which were already struggling with overcrowded rooms and classrooms, unlawful, inadequate or insufficient sanitation facilities, and no running water – would implement these

guidelines properly was unreasonable and impossible. News reports showed many schools that could not re-open, especially in Limpopo and the Eastern Cape, because they did not have the proper facilities in place to ensure that the necessary hygiene and health procedures were followed, such as the regular washing of hands and proper social distancing.

CASE STUDY

KHARIVHA PRIMARY SCHOOL

Kharivha Primary School in the Ndovhada village, Vhembe District, Limpopo was a small school which catered for 95 learners in 2020, and which recently merged with a neighbouring school.

The sanitation facilities at Kharivha were old, dangerous, and unlawful. In particular, Kharivha had four EnviroLoo toilets, built in 1989, which were old and dilapidated. The windows were broken, the vents were exposed, and the toilets had reached their capacity to hold waste. In 2000, two corrugated iron plain pit toilets were built on the school property. A plain pit toilet is one of the most basic forms of sanitation. A deep pit is dug into the earth; the pit is then covered with a slab (often concrete), which has a small hole in it. A basic seating structure is then placed over the hole. Ideally, there should be a lid on the seat. Pit toilets should also be enclosed, to give the user privacy. With a pit latrine, human waste falls into the pit and remains there until it is removed or deteriorates, and there is no flushing mechanism.

Since the EnviroLoo toilets were in such a poor condition, learners and educators opted to use the undignified, unlawful plain pit toilets instead. In March 2020, the school closed in accordance with national lockdown laws.

In preparation for schools reopening on 1 June 2020, the Minister of Basic

Education gave several undertakings, including promises to provide water tanks to all schools without water before schools opened, and replace all pit toilets in schools with mobile toilet facilities.

In May 2020, and in preparation for its reopening after lockdown, the school was told to demolish the pit toilets and communicate with the circuit manager if new toilets needed to be built. After the demolition, Kharivha's only ablution facilities were the dilapidated EnviroLoo toilets. With the limited resources available, the school chose to build new cement brick pit toilets. Unfortunately the school did not have running water on the property, and had to collect water from the community tap outside the school gate to flush toilets and to wash hands. With no running water, no safe, hygienic toilets, and the additional problem of insufficient facemasks, this school could not comply with DBE's SOP or directions, and would not be allowed to re-open.

SECTION27 wrote to the Limpopo Department of Education (LDoE) on the school's behalf, and was ready to go to court on an urgent basis to force the LDoE to ensure that Kharivha was able to comply with the hygiene and safety requirements necessary for reopening. Fortunately, the LDoE delivered four mobile classrooms, two water tanks and the necessary personal protective equipment for the learners and teachers before the schools reopened.



LAW AND POLICY

INTERNATIONAL LAW

A number of international instruments and initiatives recognise the importance of safe and adequate school infrastructure. In 2015, for example, South Africa – along with 192 United Nations (UN) member states – adopted the Sustainable Development Goals as a global effort to end poverty, protect the earth and ensure peace by 2030. Goal 4, which focuses on quality education for all, also aims to “[b]uild and upgrade education facilities that are child, disability and gender sensitive and provide safe, nonviolent, inclusive and effective learning environments for all”.

In 2015, South Africa also ratified the UN International Covenant on Economic Social and Cultural Rights (ICESCR). Article 13 of the ICESCR recognises the right to education. The Committee on Economic, Social and Cultural Rights (‘the Committee’) has explained the content of this right further in its General Comment 13 to mean that education must be “available, accessible, acceptable and

adaptable”. When describing the meaning of ‘availability’, the Committee states that:

all [functioning schools] are likely to require buildings or other protection from the elements, sanitation facilities for both sexes, safe drinking water, trained teachers receiving domestically competitive salaries, teaching materials and so on; while some will also require facilities such as a library, computer facilities and information technology.

The Committee therefore acknowledges that in order to realise the right to an education, schools need certain physical elements in place so they can function properly and serve learners’ educational needs.

In 2018, the Committee considered South Africa’s first country report, in which South Africa explained how it was implementing the ICESCR. The Committee responded to the report through so-called ‘Concluding Observations’ and indicated its concern about the poor state of public school infrastructure in the country. The Committee recommended that the South African government intensify its efforts to “improve school

infrastructure and ensure that all schools have access to water, sanitation facilities and electricity by allocating and effectively managing a sufficient level of funding”.

The UN Convention on the Rights of the Child, to which South Africa is a party, also addresses education.

In its General Comment 1, the Committee on the Rights of the Child elaborates on the aims of education, and stresses that “[e]very child has the right to receive an education of good quality which in turn requires a focus on the quality of the learning environment, of teaching and learning processes and materials, and of learning outputs”. In addition to these, article 24 of the UN Convention on the Rights of Persons with Disabilities, to which South Africa is also a party, obliges state parties to recognise the right of persons with disabilities to education, and indicates that state parties shall ensure an inclusive education system at all levels. In realising this right, state parties are obliged to ensure that:

- Persons with disabilities are not excluded from the general education system on the basis of disability, and that children with disabilities are not excluded from free and compulsory primary education, or from secondary education, on the basis of disability
- Persons with disabilities can **access** an inclusive, quality, and free primary education and secondary education on an equal basis with others in the communities in which they live
- Reasonable accommodation of the individual’s requirements is provided
- Persons with disabilities receive the support required, within the general education system, to facilitate their effective education
- Effective individualised support measures are provided in environments that maximise academic and social development, consistent with the goal of full inclusion.

These provisions therefore require that support, which includes structural support such as ramps, handrails, and so on, must be provided to ensure that

learners with disabilities are not excluded from participating in schools, and have an equal opportunity to access education.

NATIONAL LAWS, POLICIES, REGULATIONS AND GUIDELINES

Section 9 of the Constitution protects everyone’s right to equality and freedom from any form of unfair discrimination. In addition, Section 10 of the Constitution protects everyone’s right to have their dignity respected and protected.

This right is violated when learners are forced to attend school or use toilets in a way that makes them feel undignified or degraded. Section 24 of the Constitution protects everyone’s right to an environment that is not harmful to their health or well-being, and Section 28(2) of the Constitution protects the best interests of the child in any matter concerning them. Lastly, Section 29(1)(a) of the Constitution protects everyone’s right to a basic education.

In addition to these, legislation,

policies, guidelines and regulations have also been published to further explain the state’s responsibility to provide safe and adequate public school infrastructure.

For instance, Section 3(3) of the South African Schools Act (SASA) states that each Member of the Executive Council (MEC) has a responsibility to ensure that there are enough school places so that every child who lives in his or her province can attend school. In addition, Section 12(5) of SASA states that the MEC must take all reasonable measures to ensure that the physical facilities at public schools are accessible to persons with a disability.

In 2010, the DBE published a national policy on school infrastructure titled the ‘National Policy for an Equitable Provision of an Enabling School Physical Teaching and Learning Environment’. The purpose of this policy was to provide a basis for infrastructure planning and implementation, as no uniform policies or strategies on public school infrastructure had existed until then.

UNIVERSAL DESIGN

The Norms and Standards Regulations define 'Universal Design' as:

'the design of products, environments, programmes and services to be usable by all people, to address the diversity of learners and teachers with functional limitations'.

Later, in 2012, the DBE also published 'Guidelines Relating to Planning for Public School Infrastructure', which emanated from the above-mentioned national policy, and aimed to indicate what educational resources were required for a school to function properly. These guidelines were meant to provide a benchmark by which to measure the adequacy of learning and teaching environments. However, they were merely guidelines, and did not create binding obligations on the state.

In 2012, Equal Education (EE), represented by the Legal Resources Centre, launched a case in the Bisho High Court in the Eastern Cape against (among others) the Minister of Basic Education, and demanded the publication of national minimum uniform norms and standards for public school infrastructure. After a long legal process, and one more court application, the Minister of Basic Education published the 'Regulations Relating to Uniform Minimum Norms and Standards for Public School Infrastructure' (the 'Norms and Standards Regulations') in November 2013.

The publication of the Norms and Standards Regulations was very significant, as these place binding obligations on the state and require it to provide all public schools with the minimum physical resources they need

to operate properly and create safe and adequate learning and teaching environments. In order for this to be carried out, they explain exactly what must be provided in respect of a range of school structures and basic services such as classrooms, electricity, water, sanitation, laboratories, libraries, sports fields, perimeter security and universal design, and indicate by when schools should receive these.

Most importantly, the Norms and Standards created four deadlines that the DBE should be bound to keep:

- **3-year deadline: 29 November 2016** – Schools built entirely from materials such as asbestos, metal and wood, and schools with no access to any form of power or water supply or sanitation must be upgraded to ensure they are built with appropriate material and have power, water and sanitation facilities.
- **7-year deadline: 29 November 2020** – The state must ensure there is electricity, water, sanitation, classrooms, perimeter security and electronic connectivity at all public schools.
- **10-year deadline: 29 November 2023** – The state must ensure there is a library and laboratory at every public school.

- **17-year deadline: 31 December 2030** – All the other buildings and facilities mentioned in the Norms and Standards Regulations, including sports and recreation facilities, must comply with principles of universal design to ensure that learners with disabilities are able to access schools equally. This would include, for example, the provision of ramps, railings, and wheelchair-friendly facilities.

However, it is important to note that both the 3- and 7-year deadlines have either been missed or not fully adhered to.

The Norms and Standards Regulations also provide important opportunities to monitor the DBE's progress with school infrastructure projects. In particular, every year, each provincial MEC must provide the Minister of Basic Education with detailed plans on how the Norms and Standards Regulations are going to be implemented in their province. These plans must include details of the infrastructure backlogs at the district level, the cost of short-, medium- and long-term targets, how new schools will be planned, how existing schools will be maintained, and proposals on procurement, implementation and monitoring.

As these plans should provide the details of progress made on school infrastructure projects, parents and learners can use these to determine when and how their schools will be fixed, and hold the DBE accountable for the completion of these projects. In addition to developing these plans, each MEC must also provide the Minister of Basic Education with a report every year explaining how their plans have been implemented.

Section 58C(3) of SASA also confirms these reporting obligations, and obliges MECs to report annually to the Minister on the extent to which the Norms and Standards Regulations have been complied with; and if they have not, the measures taken to reach compliance.

Importantly, the Norms and Standards Regulations also state that all schools must adhere to the requirements and principles of 'Universal Design'. This must be applied to all buildings, access ways, indoor and outdoor facilities, signage, communications and other services in new schools, as well as to additions and improvements made in existing schools.

In addition, the Norms and Standards Regulations emphasise that schools for learners with special education needs must be fully accessible, through the provision of (for example) ramps, handrails and space for movement; while

schools must also comply with requirements related to the nature of support programmes offered, and the level of support required.

In 2014, the DBE published the 'Policy on Screening, Identification, Assessment and Support', which details how schools should accommodate learners with barriers to learning, which includes but is not limited to learners with physical disabilities. The policy advocates for the "reasonable accommodation" of learners, which involves making the necessary and appropriate modifications and adjustments, which do not impose an undue or disproportionate burden on schools, to ensure that persons with disabilities enjoy or exercise all human rights on an equal basis. This can include structural or physical upgrades, modifications or adjustments to school buildings.

In 2017, the DBE also published the 'School Infrastructure Safety and Security Guidelines', which explain the physical measures that must be in place to ensure the safety and security of learners, teachers and other members of the school community when providing new schools with infrastructure and when schools receive upgrades and additions.



In 2018, the DBE published the ‘Guidelines for General Upkeep and Maintenance of Education Facilities’. These guidelines aim to show schools, stakeholders and service providers the procedures and protocols that should be used to look after a school and maintain its facilities, and explain the roles and responsibilities of specific role players.

In the following year, the DBE published the ‘Guidelines for Conducting Condition Assessment of Education Facilities’ to assist with its reporting obligations

stated in section 58C (3) of SASA. These guidelines provide a uniform approach to assessing the condition, state and adequacy of all the DBE’s educational facilities to ensure that it has accurate and up-to-date information on the state of public school infrastructure, and can develop adequate infrastructure plans based on this data. The DBE will facilitate the process of initiating and managing the assessment, and will work together with provincial education departments. However, the assessment should be carried

out by professional service providers in the built environment, who are registered with any recognised South African professional bodies. Among other things the service provider must be responsible for planning the assessment, engaging with facility management, analysing the data gathered, and producing an assessment report. The outcomes of the assessment will be used to develop ‘Provincial Project Priority Lists’, and both the assessment outcomes and the priority lists provided will be published on the DBE’s website.

In addition to this, Section 8 (1) of the Occupational Health and Safety Act states that “[e]very employer shall provide and maintain, as far as is reasonably practicable, a working environment that is safe and without risk to the health of his employees”.

FUNDING SCHOOL INFRASTRUCTURE PROJECTS

Section 12 (1) of SASA states that the MEC “must provide public schools for the education of learners out of funds appropriated for this purpose by the provincial legislature”. To give effect to this provision, National Treasury allocates a certain amount of money to provincial departments called the ‘Equitable Share’, which is used for school infrastructure projects and maintenance, among other uses.

National Treasury has also created a specific grant called the Education Infrastructure Grant (EIG), to assist provinces with public school infrastructure projects. This grant supplements the amount provincial departments receive from the Equitable Share and is meant to assist with the maintenance of existing school infrastructure, as well as the building of new infrastructure projects.

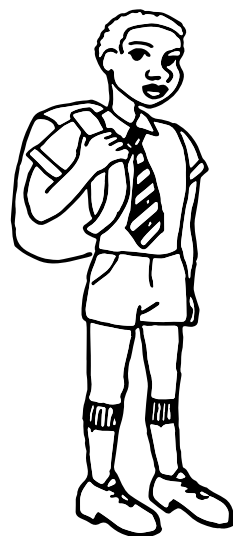
The State has also instituted the Provincial Schools Build Programme, which is implemented by provincial

departments and focuses on providing basic services, new schools, additions to existing schools, and new and upgraded services and maintenance. This programme receives its funding from both the Equitable Share and the EIG.

In 2011, the DBE also created the Accelerated School Infrastructure Delivery Initiative (ASIDI). ASIDI was created after the ‘mud schools’ litigation initiated by the Centre for Child Law, which is discussed further below. This initiative targets school infrastructure backlogs, with a specific focus on fixing

schools without water, sanitation and electricity, as well as those built of inappropriate materials such as mud, asbestos, and metals including zinc. The ASIDI is funded by a grant called the School Infrastructure Backlog Grant.

In addition to these sources, in August 2018 President Ramaphosa launched the Sanitation Appropriate for Education (SAFE) initiative, which aims to accelerate the provision of sanitation facilities and replace pit latrines and other forms of inappropriate sanitation in accordance with the Norms and Standards Regulations.



The maintenance of schools forms a critical part of ensuring that school infrastructure remains safe and adequate, and schools have a specific responsibility to maintain the school environment.

The SAFE initiative is a partnership between the state, the United Nations Children's Fund, the Nelson Mandela Foundation and the National Education Collaboration Trust (NECT). The private sector has also been invited to collaborate on this project and assist with its funding. At the time, the SAFE initiative identified 3 898 schools that required intervention. This number has since been reduced to 2 753 schools, as schools have been rationalised (merged or closed), or found to have adequate sanitation. Schools have been allocated to different implementing

agents under various programmes; these agents include the Development Bank of South Africa, NECT, The Mvula Trust, and the Coega Development Corporation. The DBE monitors these projects and reports directly to the Presidency on the progress made to replace pit toilets. The SAFE programme is funded through the School Infrastructure Backlogs Grant, which amounts to R2 283 million over the 2021/2022 financial year. Around half of this budget goes to the SAFE programme.

Lastly, the maintenance of schools forms a critical part of ensuring that

school infrastructure remains safe and adequate, and schools have a specific responsibility to maintain the school environment. In this respect, the DBE's Amended National Norms and Standards for School Funding state that public ordinary schools should receive a certain amount of money from provincial departments to spend on recurrent non-personal and small capital expenses. This includes, but is not limited to, normal repairs and maintenance including building repair work to the physical infrastructure of the school.



CHALLENGES WITH SCHOOL INFRASTRUCTURE DELIVERY

Despite the legally binding deadlines contained in the Norms and Standards Regulations, the DBE has failed to meet both its 2016 and 2020 deadlines, as schools across the country continue to operate with structures built from inappropriate materials such as mud, zinc and corrugated iron.

Sadly, the 2021 NEIMS report also provides evidence that 3 343 schools across the country still suffer from unreliable electricity supply, 5 836 schools still have an unreliable water supply, and 5 167 schools still use pit toilets, meaning that thousands of schools are operating under unlawful conditions.

In its presentations before the Portfolio Committee on Basic Education, the DBE has highlighted several issues that hinder the eradication of public school infrastructure problems. These have included inaccurate and unreliable data regarding the state of school

infrastructure, difficulties attracting infrastructure specialists such as engineers and surveyors, especially in rural provinces, and community disruptions such as protests and vandalism.

One of the larger challenges facing school infrastructure delivery centres around provinces and their increasing tendency to allocate less money from their Equitable Share allocation towards fixing school infrastructure problems, choosing rather to rely on the money received from the EIG to complete their school infrastructure projects. This occurs despite the fact that the EIG was

created to merely supplement provinces' Equitable Share allocations. This tendency reduces the amount of provincial funding allocated towards infrastructure projects and causes further delays and backlogs.

In addition, over the last few years the state has been spending less and less money on its learners. In a joint submission to the Select and Standing Committees on Appropriation on the 2020 Adjustments Appropriations Bill, SECTION27, EE and EELC highlighted the state's worrying trend of deprioritising basic education by decreasing its spending on basic education.

This means that the money allocated to address needs such as school infrastructure is no longer enough, especially considering that teacher salaries and learner enrolments increase every year. In addition, both the EIG and School Infrastructure Backlogs Grant are continuously receiving less funding. See Chapter 2 on 'Funding Basic Education' for more information on how the state spends money on basic education.

The COVID-19 pandemic has created additional challenges in terms of the availability of funds for school infrastructure projects. In June 2020, the state made a deliberate choice to readjust its budget and published a Special Adjustments Budget that reallocated money to assist with COVID-19-related needs, such as the provision of personal protective equipment (PPE) and sanitiser. Severe cuts were made to DBE funding, which included a R2.2 billion reduction to the EIG. In addition, R4.4 billion was reprioritised and taken from the EIG to provide clean water and soap, additional mobile classrooms, the daily cleaning of classrooms, the screening of learners and teachers, and the provision of PPE and sanitiser. A further R600 million was also

reprioritised and taken from the EIG and given to the School Infrastructure Backlogs Grant to provide water and water tanks to schools without access to potable water. The School Infrastructure Backlogs Grant was also reduced by R60 million.

These reallocations resulted in the suspension of many school infrastructure projects, without any further detail on when these would resume. While the 2021 budget shows that money has been restored to the EIG, these cuts have severely delayed infrastructure projects, and the DBE will need to attend to these outstanding projects – together with those planned for the new financial year – in this new budget. In addition to the problems mentioned above, the DBE has experienced challenges with underperforming implementing agents. In 2018, EE released a report titled 'Implementing Agents: The Middlemen in Charge of Building Schools', in which it investigated the use of implementing agents in the Eastern Cape and identified problems hindering public school infrastructure delivery. Among others these included a lack of proper oversight over school infrastructure projects, overworked project managers,

a lack of transparency in the procurement of implementing agents, and the state's failure to properly address misconduct or negligent acts by implementing agents. These are just some of the challenges that have caused poor performance and the slow delivery of work that at times has also been of inferior quality. It is noteworthy, however, that in 2019 the DBE published 'Guidelines on Minimum Requirements for Implementing Agents', which among other things sets out the roles and responsibilities of implementing agents, the minimum level of service that must be provided, and the processes and structures that implementing agents must have in place when working with the state.

In addition to the above challenges, some of the annual reports compiled by MECs in respect of the Norms and Standards Regulations have often lacked important detail and failed to specify infrastructure projects, the cost of such projects, and the dates upon which these will commence and be completed. The content of these plans also differs from province to province, and the DBE has not made the most recent plans publicly available on the DBE's website.

These challenges hinder civil society's ability to monitor the DBE's progress and hold it accountable for projects that must be undertaken and completed.



INFRASTRUCTURE LITIGATION

Since 2011, the need to address the school infrastructure crisis in South Africa has gained traction. This has occurred through a combination of the rise of education-based activist movements, and public-interest lawyers and their more frequent use of the courts. Some of these cases are discussed on the following pages.

CASE STUDY

THE MUD-SCHOOLS CASE

In 2010, in the matter *Centre for Child Law and Seven Others v Government of the Eastern Cape Province and Others* (or the 'mud-schools case') the Legal Resources Centre, representing the Centre for Child Law ('CCL') and seven Eastern Cape mud schools, launched the first significant case concerning school infrastructure before the Grahamstown High Court. The schools struggled with dilapidated mud buildings, no running water or sanitation, and inadequate school furniture. The matter was settled out of court by way of a memorandum of understanding, which obliged the State to provide R8.2 billion over three years to address the mud-school problem as a whole, as well as allocating specific funds to the seven schools. This led to the DBE's development of the ASIDI programme, which was aimed at addressing the school infrastructure backlog.

CASE STUDY

KOMAPE CASE

On 20 January 2014, just two months after the Norms and Standards Regulations were published, a five-year-old boy named Michael Komape died when he fell into a pit toilet at his school, Mahlodumela Lower Primary school, located in Limpopo. The unstable and broken makeshift 'seat' structure of the toilet was so corroded that it could not hold his weight, and after he fell in, he suffocated to death in human waste.

In 2015, represented by SECTION27, the Komape family launched a claim for damages in the Polokwane High Court against the state for the death of Michael Komape. The Komape family sought compensation for the emotional shock and trauma they had suffered due to Michael's death, and money to cover the cost of past and future medical expenses, funeral and burial costs, and loss of income; they also made a novel claim for compensation for the grief felt by the family. Alternative to the claim for grief, the family sought to claim 'constitutional damages' based on the state's violation of constitutional rights. SECTION27 also asked the court to grant a declaratory order stating that the state and the school leadership had failed to fulfil their duty to protect Michael and other learners from unhealthy and unsafe school conditions.

Most of the claims for medical and funeral expenses were settled before the trial. The state also conceded liability for the 'emotional shock and trauma' caused by the death of Michael Komape. However, the amount the state owed to the Komape family for such emotional shock and trauma, as well as the claims for grief and/or constitutional damages were disputed. Despite the state having conceded liability for emotional shock and trauma, in *Komape v Minister of Basic Education*, the High Court refused to grant compensation based on evidentiary technicalities. Further, the High Court rejected the claims for grief and/or constitutional damages, stating that constitutional damages would be 'punitive' for the government and amount to 'overcompensation' for the Komape family.

However, the court did grant a structural order obliging the state to install a sufficient number of toilets at each rural school currently equipped with pit latrines in Limpopo. This was because the High Court had observed that

the state had shown that it "...lacked the will to act in the interests of pupils". To ensure that it would actually act to eradicate pit toilets, the state was required to furnish the court with a list of schools with pit toilets, the estimated period required to replace the pit toilets, and a detailed and reasonable programme for the installation of suitable sanitation technology.

While not appealing the structural order, SECTION27 appealed the High Court's refusal of damages before the Supreme Court of Appeal (SCA). The SCA awarded R1.4 million in general damages to the Komape family for emotional shock and trauma, but refused the claim for grief as a separate claim (arguing that grief fell within the claim for emotional shock and trauma). The SCA also refused the family's claims for constitutional damages and would not grant a declaratory order stating that the state and the school leadership failed to fulfil their duty to protect Michael and other learners from unhealthy and unsafe school conditions.

Despite the rejection of the claim for grief and constitutional damages, the SCA judgment was a victory for the Komape family and their long journey for justice for Michael. The SCA stated:

Importantly, the respondents' attitude obliged the appellants to come to court to obtain redress in proceedings which have been drawn out. Although, as I have already said, this was a case which cried out for settlement, the appellants were obliged to go to trial, submit to the rigours of the hearing, and to relive the trauma of the past in excruciating detail. This included being subjected to unsympathetic and, at times, cruel and denigrating cross-examination. All of this must have aggravated their mental agony. The respondents' attitude to the litigation, up to and including this appeal in which in certain respects they attempted to defend the indefensible, is to be deprecated in the strongest possible terms. As a result, the appellants have been prevented from getting on with their lives and recovering from their trauma.

However, this was not the end of the matter. The state filed a 'plan' and a progress report, as required by the High Court judgment, with the High Court in late 2018 and 2020. The plan and progress report were constitutionally deficient and in breach of the structural order in several respects:

- The data in the plan regarding the number of schools with pit toilets was incomplete and inaccurate, and contradicted other

state reports. It is impossible to assess if all schools with pit toilets are being catered to if the data the state provides is inaccurate.

- The criteria the state was using to assess whether there are adequate sanitation facilities at school were unclear.
- A number of different initiatives were described in the plan, but there was no indication as to how the plans interacted. The roles of different stakeholders in government were not set out.
- The plan seemed to allow for unused pit toilets to exist alongside other safe toilets at schools.
- No overarching timeline was provided as to when pit toilets would be eradicated in schools in Limpopo. However, from what could be comprehended, the average start date for the eradication of pit toilets in the state's plan was between 2026 and 2028. This was despite the fact that the structural order had stated that pit toilets must be eradicated "...in the shortest period of time".

SECTION27 therefore returned to the High Court to seek an order declaring the state's plan unconstitutional and that it failed to comply with the High Court's structural order. SECTION27 also requested the court to oblige the state to remedy the shortcomings of its current plan so that it would be constitutionally compliant. In addition, SECTION27 sought an order directing the state to constitute and lead a 'Sanitation Task Team'. This task team would be responsible for verifying, updating and ensuring the accuracy and currency of the provincial school sanitation information held by provincial and national government. The task team would also need to ensure the implementation of a reasonable plan so that pit latrines would be eliminated in Limpopo within one year from the new order.

On 17 September 2021, the High Court delivered a judgment finding that the state's plan was unreasonable, unconstitutional, and in violation of the structural order. However, the court found that the creation of a Sanitation Task Team was not yet necessary, and that the state should be given another chance to deliver and implement a new constitutional plan. The High Court thus ordered the state to create a new plan that would remedy the deficiencies of the original plan; and subject to such a plan being constitutional, to implement the plan and to deliver progress reports to the court every six months until the plan was fully implemented.



CASE STUDY

EQUAL EDUCATION - FIXING THE NORMS AND STANDARDS REGULATIONS

In 2018, EE represented by EELC challenged the constitutionality of certain provisions of the Norms and Standards Regulations in the case *Equal Education and Another v Minister of Basic Education and Others*.

The matter was heard in July 2018 in the Bisho High Court, located in the Eastern Cape. In her judgement, Judge Msizi confirmed that "the National Government bears the overall responsibility of ensuring the state's compliance with the obligation in [S]ection 29(1)(a)" and that "it is indisputable that basic school infrastructure plays a significantly high role in the delivery of basic education". The judge also reaffirmed that the right to basic education is "multi-faceted" and "includes the provision of proper facilities". In addition to this, the judge made the following decisions regarding the provisions EE challenged:

Sub-regulation 4(5)(a) of the Norms and Standards Regulations, also known as the 'escape clause', states that its implementation is subject to "the resources and cooperation of other government agencies and entities responsible for infrastructure in general and the making available of such infrastructure". EE argued that this would allow the state to escape responsibility to address public school infrastructure if other actors involved in building and maintaining schools were not doing their job properly. The Court agreed with EE, and declared this regulation unconstitutional, unlawful and invalid.

Sub-regulation 4(3)(a) read together with sub-regulation 4(1)(b)(i) of the Norms and Standards Regulations states that schools made entirely of inappropriate materials such as asbestos, metal and wood must be "prioritised" by November 2016. EE argued that the meaning of the term 'prioritised' was not explained, and it was unclear whether these schools must be replaced within this time-period. EE also highlighted that the regulations do not provide for schools that were built partly from inappropriate materials, such as a classroom or staff room. The court agreed with EE and ordered that all these schools should be replaced within the three-year period stipulated in the Norms and Standards Regulations, including schools made entirely from mud, asbestos, wood or metal, as well as schools built partly from these materials, such as classrooms. The court also ordered that the Norms and Standards Regulations be changed to state that "classrooms built entirely or substantially" from inappropriate materials should be replaced.

Similarly, sub-regulation 4(3)(a) read together with sub-regulation 4(3)(b) of the Norms and Standards Regulations states that schools with no power supply, water supply or sanitation would be "prioritised" by November 2016. Again, EE argued that this regulation did not explain the meaning of 'prioritised', and that there was no certainty that the problems affecting 'prioritised' schools would be completely eradicated. The court agreed with EE and ordered that the Norms and Standards Regulations be understood to mean that all schools that have no access to water supply, power supply or sanitation, must comply with the Norms and Standards Regulations within the three-year timeframe stipulated.

Sub-regulation 4(1)(a) read with sub-regulation 4(2)(b) of the Norms and Standards Regulations states that schools already planned and budgeted within the 2013-2016 Medium-Term Expenditure

Framework (MTEF) would be excluded from the Norms and Standards Regulations. EE argued that these regulations allow for the entire exclusion of new schools, additions, alterations and improvements that have already been planned and budgeted for under the MTEF plan, which would not need to comply with the Norms and Standards Regulations and are not subject to the timeframes within which schools must be fixed. The High Court agreed with EE and declared this regulation to be inconsistent with the Constitution. In addition, the court ordered that this regulation be understood as requiring all current plans involving schools and projects, as well as future plans, to be implemented in a way that is consistent with the Norms and Standards Regulations.

Sub-regulations 4(6)(a) and 4(7) of the Norms and Standards Regulations oblige MECs to provide detailed plans to the Minister of Basic Education on an annual basis which indicate how the Norms and Standards Regulations will be implemented, as well as their progress made. However, these plans are not required to be made public. EE argued that by refusing to make these plans public, the DBE was preventing school governing bodies, educators, parents and learners from monitoring progress on infrastructure projects at their schools. The High Court agreed with EE and not only held that these sub-regulations were unconstitutional, but also ordered the Minister to amend the Norms and Standards Regulations so that these plans and reports would have to be made publicly available within a specific, reasonable period after they were submitted.

To date, the amendments to the Norms and Standards Regulations are still outstanding and have not been released for public comment by the DBE.

CASE STUDY

MAKANGWANE SECONDARY SCHOOL

Makangwane Secondary School was a dilapidated school located in rural Limpopo. The school was built by the community in 1974, and had fallen into a dire state of disrepair over the years. When a piece of corrugated iron blew off a classroom roof during school lunch, nearly injuring a group of learners, the SGB and community decided that the dilapidated infrastructure of the classrooms made them too unsafe to learn in. It was decided that lessons would continue under the trees surrounding the school. However, this was hardly a solution, because learners were exposed to external elements such as roaming livestock, snakes, and the harsh weather. Teachers would at times refuse to teach because of the severe weather conditions, and a significant amount of learning time was being lost.

On behalf of Makangwane Secondary School, SECTION27 approached the Polokwane High Court to address these issues. This resulted in two judgments, in both of which the court found in favour of Makangwane Secondary School. In the first judgment, the court granted an order in terms of which the state was ordered to instal five temporary mobile classrooms, deliver sufficient furniture, and formulate and implement a catch-up plan for learning. Further, the state was ordered to develop and implement a costed plan, in consultation with the community, for the renovation or construction of permanent school classrooms.

In the second judgment, *School Governing Body, Makangwane Secondary School v MEC Limpopo Department of Education*, a declaratory order was granted, which made clear that the rights of the learners were violated by the state's failure to ensure proper infrastructure. In a powerful statement, Judge Semanya noted:

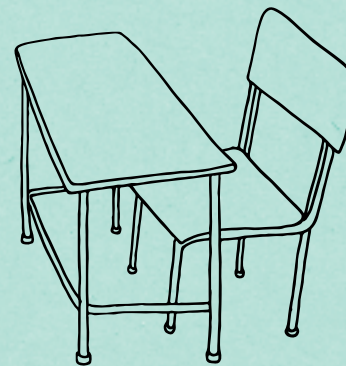
It is hard to believe that a self-respecting child, who is expected to take a bath and wear [a] clean uniform will be made to bear

with learning in these dilapidated classes. The fact that Makangwane is a no-fee school is in itself an indication that it serves a poor community. One can infer that some of the children live in houses that are not up to standard. The extension of their conditions of learning to an educational facility, by a Government institution for that matter cannot be condoned. There can be no-doubt that the learners at the School will never feel honoured and respected [like] learners from well-equipped schools. I therefore agree with counsel for the applicant's contention that the structures in which learners learn, the way in which children are taught and their sense of safety and well-being all have a great impact on dignity and self-worth.

In 2018, the state complied with the temporary remedies ordered by the court. In addition, while meaningful engagement with the community did not necessarily take place, the state did fulfil the requirements necessary for a merger between Makangwane Secondary School and a neighbouring school, Ramohlakana Secondary School, which was completed in March 2021.

The Makangwane case affirms that safe and adequate infrastructure is an essential component of the right to basic education. The case also illustrates that sufficient furniture is a necessary component of the right to education. The government therefore has a duty to ensure that all schools are equipped with safe infrastructure and sufficient furniture. Funding for furniture at schools comes from the Norms and Standards for School Funding money for non-personnel expenditure given to every ordinary public school yearly. This money is intended to cover a number of costs necessary for schools. They include the cost of textbooks, stationery, sporting equipment, water and electricity, as well as infrastructure maintenance and repairs. Often, the allocated money is not nearly enough to cover all the costs necessary for schools to operate.

Furniture as an element of the right to basic education is elaborated on further below, with reference to the Furniture litigation.



CASE STUDY

FURNITURE LITIGATION

In February 2014, the Eastern Cape High Court, Mthatha, delivered judgment in the matter *Madzodzo and Others v Minister of Basic Education and Others*, which concerned the provision of school furniture. This judgment had its genesis in the above-mentioned 'mud-schools case', which was launched in October 2012.

In the 'mud-schools case', the CCL, represented by the Legal Resources Centre, requested the court to declare that the Minister of Basic Education, the Eastern Cape MEC for Education and the head of the department of the Eastern Cape Department of Education had violated the affected learners' rights to education, equality and dignity due to their failure to provide, among other things, adequate age- and grade-appropriate furniture at the learners' schools. The litigation also sought more systematic relief that required the appointment of independent auditors to determine the furniture needs of all schools in the province. The matter ended in a settlement agreement, embodied in an order of court, which required (among other things) that the audit of all Eastern Cape schools be concluded by 28 February 2014, and that the results be handed over to the parents' lawyers.

Almost a year after the conclusion of the settlement agreement, the CCL (together with

parents from four more schools) returned to court, arguing that the settlement agreement had not been complied with. However, this time, they sought the appointment of an independent body to verify the results of the DBE-conducted audit and to devise a plan specifying when each school listed on the audit report would receive their required furniture.

The court was also requested to order that the required furniture be delivered to all schools 90 days after the completion of the independent audit. The matter was settled in part, as the state resisted being held to a specific delivery date, arguing that all that could be expected was a reasonable plan to provide furniture within the shortest possible time.

In its judgment, the court stated that "insufficient or inappropriate desks and chairs in the classrooms in public schools across the province profoundly undermines the right of access to basic education", and agreed with the 90-day delivery date, largely ascribing its reasoning to the state's failure to make a firm commitment on when it intended to deliver the furniture.

The state's failure to meet the 90-day deadline prompted another round of litigation; and in January 2016, the Eastern Cape High Court, Mthatha, granted an extensive order in favour of the CCL obliging the Minister and MEC to establish a Furniture Task Team led by a minister-appointed national coordinator.

The task team would be responsible for preparing a consolidated list of furniture needs

at all Eastern Cape public schools. This list would then be put through a verification process, and the results would be communicated to the court by 31 August 2016. In addition, the court order required that all schools should have their furniture needs met by 1 April 2017. The Minister was also obliged to file quarterly reports to the court, containing information on budgeting and implementation processes undertaken to ensure compliance with the order. The CCL and the LRC were also required to meet with the national coordinator at least once every 90 days.

The deadline of 1 April 2017 was not fully complied with, and the Eastern Cape Department of education (ECDOE) applied for a variation of the court order which extended its deadline to 30 November 2017. This was made an order of court by agreement.

Since then, the ECDOE has submitted its June 2017 and October 2017 reports, which reflected some promising developments.

As the case law shows, our courts have confirmed that safe and appropriate school infrastructure and desks and chairs are critical components of the right to a basic education. The state also has clear legislative, constitutional and international obligations to ensure that school infrastructure is adequate. The state should therefore be held accountable for its plans to repair, maintain or replace schools so that the right to basic education can be fully realised in our country, and learners can access education in a safe, equal and dignified way.

PRACTICAL STEPS YOU CAN TAKE IF YOUR SCHOOL HAS BAD INFRASTRUCTURE

- Familiarise yourself with the Norms and Standards Regulations, noting what your school is entitled to receive, and by when.
- Know your province's infrastructure plan. Each provincial MEC of education must provide the Minister of Basic Education with an infrastructure plan every year stating how they will achieve the Norms and Standards Regulations. The MECs must then report to the Minister every year on the progress their province has made on the implementation of these plans. Each plan should have a project list containing the names of schools that the province intends to assist.

Check if your school's name is on the list and confirm whether the infrastructure projects on the list are correct. The MEC's 'Provincial Infrastructure Plans' and project lists should be available on the DBE's website. If they are not, you can submit a request for this information in accordance with the Promotion of Access to Information Act.

- If the information on the project list is incorrect, you can approach the relevant district office or the civil society organisations for help, the details of which are set out in the 'List of Organisations' found at the back of this handbook.

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